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ABSTRACT

The author examines the influences of classical Greek and Roman literature and law upon court decisions in the United States during the first decade following the adoption of the Constitution. References to Greek and Roman literature, history, and mythology by Virginia's High Court Chancellor George Wythe and by several Justices of the Supreme Court are given as examples. The classical allusions and expressions served three functions: as expressions of a particular sentiment based on the literary context of the quote, as similies, and as legal precedents. Examples illustrating these usages are given. The explanation presented in the document for the classical presence in American legal opinions goes beyond the educational background in classics which most jurists had at that time. The break which the colonies had made from England during the Revolution created an atmosphere in which American jurists had to define new relationships between states and a federal government. Classical precedents were favored over British law at this time. Most frequently quoted from the classics were Justinian, Cicero, Virgil, Aeschylus, and Demosthenes. (AV)

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CLASSICAL INFLUENCES IN THE DEVELOPMENT OF AMERICAN LEGAL CULTURE

by

Richard J. Hoffman

The Fathers of the American Republic were no strangers to classical antiquity. It therefore comes as no great surprise to find references to things classical in the legal opinions rendered in the courts of the United States in the first decade following the adoption of the Constitution. Not only were classical tags or allusions used as devices for making arguments more forceful, meaningful, and clear, but, more importantly, classical references collectively played an important part in the struggle at the beginning of the Republic over the form and function of law and the judiciary. In this paper I will consider the opinions during this time span of the first decade of the Republic of the United States Supreme Court and the Virginia High Court of Chancery. In so doing I shall first examine the sources and rhetorical functions of the classical allusions in these opinions. Second, since the interplay of law and classics forms an important element in the argumentation of jurists, I wish to provide an explanation for the classical presence in the early opinions.

II

The sources of the classical references in the opinions of Virginia's George Wythe--the Chancellor in this decade--and the Justices of the Supreme Court are similar. Here we find allusions and quotes taken from Greek and Roman literature, history, and mythology, though, as with France in this period, Roman references tended to be favored over Greek ones. Any dissimilarity between the two courts arises in the frequency of references to Roman law:

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Chancellor Wythe made extensive use of the Corpus Iuris Civilis, while the Supreme Court Justices made no references to Roman law.

Chancellor Wythe makes 85 classical references in 21 out of the 104 cases which are reported. Of these references, 46% (39) appear in the text of his opinion and 54% (46) appear in notes added by himself. Of these many allusions, only 19 (22%) are not tied to a specific piece of ancient literature. These references, which include several mythological characters and historical events, are concentrated in only a few opinions--15 references belong to but three cases.

The preponderance of references--78% (66)--are linked to literary sources. A brief look at the authors which he employed indicates that he was rightly dubbed by his contemporaries "a walking library." Of the 24 ancient authors he employed, his favorites were Justinian (quoted or cited 21 times), Cicero (7 times), and Virgil (6 times). Other Roman authors include Caesar, Q. Curtius Rufus, Horace, Juvenal, Livy, Lucretius, Petronius, Plutarch (Cato the Elder), Quintilian, Suetonius, Tacitus, Terence, and Valerius Maximus. From the Greeks, Wythe utilized Aeschylus (twice), and Demosthenes, Euclid, Herodotus, Homer, Sophocles, and Thucydides, each once. It should be noted that while Wythe does not always reveal the ancient author being used, his pattern in this practice is fairly uniform: a complete or partial citation always occurs when he used his ancient source as a legal precedent; in other situations, he became more literary, often preferring to use a Latin couplet without identifying its author. However, in the manner of the Renaissance humanist, knowledge of the ancient

context of the quote is usually necessary for understanding its purpose within the opinion.

While classics are not as extensively used by the Supreme Court as they are by the High Court of Chancery, their presence is still noteworthy. Twelve classical references are made in five cases by four Supreme Court Justices, and by one Attorney General and several lawyers who argued before the court. Of these allusions, only five are not connected with literary sources. The authors associated with the seven remaining quotes and allusions are Cicero, Demosthenes, Isocrates, Plutarch (Themistocles), and Grotius (on Scipio and the Carthaginians). In spite of the fact that this number seems small, two points should be made. First, classical references do appear in almost one-fifth of the opinions reported, the same percentage as found in Wythe. Second, the greatest number of classical allusions occurs in the most controversial case of the period, Chisholm v. Georgia (2 Dallas 419: 1793).

Classical allusions and expressions serve three literary functions in the opinions of both courts: as expressions of a particular feeling or sentiment, as similes, and as legal precedents. Several examples will help to illustrate these usages.

Chancellor Wythe used Latin quotes six times in order to express a sentiment. For example, when ruling in favor of a sheriff whom he thought had been unjustly treated in law, Wythe indicated the humanistic quality of his Court of Equity by quoting the Golden Rule and Terence's "homo sum: humani nihil a me alienum puto" (Heauton Timorumenos 77: Godall and Clough v. Bullock, Wythe 328 at 334). On another occasion he put into the mouths of

luckless farmers a couplet from Virgil's First Eclogue.

Similarly, quotes are used twice on the federal level to express a sentiment. The most elaborate usage is to be found in Glass v. the Sloop, Betsey (3 Dallas 6 at 14). Here, the lawyers for the appellants express their fears about the French consul's would be judicial authority by quoting, in Latin, from the poignant beginning of Cicero's pro Milone.

Classical quotes and allusions appear more frequently in similes than in sentimental expressions. Of Wythe's 26 similes, 21 are in some way concerned with justice or the judicial process. Many of these similes are straightforward: e.g., in one, he compared declaratory statutes to Janus. In a more complex simile, he compared the publication of his opinions to Cato the Elder's learning of Greek. Wythe did not wish to be considered an emulator of Westminster Hall by the practice, nor did Cato of the Greeks. But the simile goes further than that, for it was not by chance that he chose an episode from Cato's life: not only did Wythe hate the practices of Westminster as much as Cato hated the practices of the Greeks, but he was known in Virginia as the Cato of his country.

Similes also have a place in the Supreme Court opinions. Justice Peterson compared the supremacy of Congress over the states to be like that of Juppiter over the lesser deities (Penhollow v. Doane's Administrators, 3 Dallas 54 at 81). In a more complex simile in Chisholm v. Georgia, James Wilson compared the spirit of America to be like that of ancient Athens.

The last and most important use of classics is for legal precedents. Wythe employed various sources 47 times in this way.

Occasionally he cited an ancient source, like Tacitus or Caesar, to show why he interpreted a particular Latinate word the way he did. More often, however, the ancients provided him with specific legal points for justifying his decisions. Twenty-one references come from Justinian alone, and cover such areas as maxims, treatment of prodigals, pawn pledges, legacies, and sureties. Other legal precedents are drawn from such juristic sources as Cidero and Quintilian, as well as from poets, like Horace, and historians, like Livy. It should be noted, however, that only 16 precedents occur in the texts of his opinions. He added the remainder as glosses at a later time.

As with Wythe, the preponderance of classical allusions in the Supreme Court opinions are connected with precedents. Unlike Wythe, however, none of the precedents were drawn from Roman law. Historical rather than strictly legal precedent prevails on the federal bench. Here, as at the Constitutional Convention, the practices of Greek Leagues, the Spartan ephorate, and the Athenian courts were argued as models and guides.

III

The explanation for the classical presence in the legal opinions of American jurists is complex. Not only must one consider the education of these legal minds, but one must also consider the tradition of polemical writing of the times. More importantly, however, there was the historic situation in which these men found themselves in the last quarter of the eighteenth century: the Revolution and the Constitution had created for the jurist a new set of judicial conditions that had to be dealt with.

Education in classics had always played an important part in the intellectual life of colonial America. Wythe himself exists at one end of that educational spectrum. His mother taught him the rudiments of Greek and Latin, which he then went on to perfect. Indeed, Jefferson once noted that Wythe was "the best Greek and Latin scholar in the state." As a classicist and as the first professor of law in America, Wythe's opinions are often didactic in nature, and his use of classical imagery and *exempla* are frequently forced. Yet, even at his most pedantic, Wythe does not employ classics for display only.

One example which illustrates the pedantic, yet meaningful, use of classics that resulted from his education is in *Williams et al. v. Jacob et al.* (Wythe 145 at 150). Wythe had upheld the rights of certain farmers against eviction by soldiers with military warrants, a decision that was reversed by the Court of Appeals. In criticizing this reversal, the Chancellor expressed the "anguish" of the dispossessed by saying, "He (the settler) could only bewail his misfortune in some such terms as--dulcia linquimus arva, and mutter to himself, Impius haec tam culta novalia miles habebit." It is difficult to imagine settlers in western Virginia muttering in Virgilian hexameter. But, both quotes are more than a pedantic musing. The first, from Lucretius (5.989), substitutes *arva* for *lumina vitae*: the farmer's fields are his life, and without them he will die. The second quoted passage, from Virgil (*Ec.* 1.71), was written by the poet when he lost his farm to soldiers during a civil war.

A more moderate, though more refined, user of classics was

James Wilson. Appropriately, he received his literate education at St. Andrews (Glasgow).

At the other end of the spectrum was Edmund Pendleton, who presided over the Virginia Court of Appeals. He was from a poor family, learned law through experience, and read little--and then only English law. In his autobiography he states with some pride that he had no classical education. His narrow, more practical training, as well as his lack of knowledge of antiquity, dictated the type of opinion which he wrote: it was usually full of precedents from English law and English commentaries, without any references whatever to things classical.

Education alone, however, cannot explain the frequency or even the presence of classics in legal opinions. At best, education indicates a potential for classical usage, but not the impetus itself. The same could be said for the Style of the age, especially in polemical literature. Both in France and America classics were used in writing and speaking: it could be expected that classics would also appear in legal opinions, since they are, after all, a specialized form of polemicism. But even here a contemporary of James Wilson criticized the latter's legal classicising as a form of "tawdry ornamentation." A brief look at the British courts will help to clarify the situation.

The Chancellors and Chief Justices of England, with only one or two exceptions, had classical educations far superior to those possessed by most American jurists. They could read and write Latin and Greek, and several had training in Roman law as well. Their education and the Style of the age would, presumably dictate classics

in their legal opinions. Yet, no classical allusions ever appear in the opinions of the Chancellors or Chief Justices. There are, however, a few cases in which Roman law is cited; but almost without exception such cases were on appeal from ecclesiastical courts, where Roman law was used. Thus, British court practices also reveal that education can go only so far in explaining classical usage in courts, and that while legal opinions may be polemical in nature, they do not necessarily call for classical references, even when readily available. Furthermore, it is clear that the use of classics, including Roman law, in American courts did not result from the mimicking of British courts of law or equity.

The explanation for the presence and purpose of classics in the opinions of American jurists has to be sought in the historical situation of the new nation after the Revolutionary War. American jurists were faced with the dilemma of to what degree British law and practices ought to prevail in the various states. This problem was expanded to the national level with the adoption of the Constitution in 1789. The federal jurist had to work out the nature of the legal relationships between states and between a state and the federal government. Consistently, classics played a supporting role for jurists attempting novel solutions to these problems.

For Virginia, as for other states, one of the greatest judicial questions lay in the area of which body of legal precedent was to be followed in the courts. Very early on, however, Virginia officials agreed that English common law prevail, a decision which was challenged from several quarters. Indirectly, Virginia's judges often ignored English precedent, even when relevant. More

directly, the Virginia legislature enacted laws which were contrary to common law holdings. The biggest challenge to the English system as practiced in Virginia, however, came from George Wythe.

Chancellor Wythe advocated rationalizing law by following the logical meanings of words when interpreting statutes and testaments, and by citing precedents which were rational and fitting. Often this latter meant utilizing the principles of Roman law.

Wythe had long employed Roman law in his practice before the courts. As a lawyer before the Revolution, he often cited the Digest in his arguments, a practice which he continued in his legal opinions after his appointment as sole Chancellor in 1789. By 1795, however, Wythe felt impelled to speak out, in print, against the law as practiced in Virginia, with special reference to the British influence there. One reason for ~~his~~ feeling so impelled came from the piecemeal effort to codify Virginia's laws. Wythe, who had been a member of many codification commissions, saw yet another commission go down to failure in 1795. Furthermore, by that year, he had had the bitter experience of having aproximately one-half of his decisions reversed that had gone before the Court of Appeals. As a result, Wythe published his Chancery Decisions as a legal guide to Virginia jurists. In order to clarify the law and to justify his reversed decisions, he rewrote or glossed many of his opinions, often adding the legal principles, and their sources, which had been originally ommitted. Indeed, to some opinions he added lengthy quotes on various topics in Roman law, going so far on one occasion as to write a small treatise on testamentary succession which was based on Justinian and other Roman

jurists. In these efforts, he made his attitudes towards English law quite clear: Common Law was the law of nature and reason, for only it was common to all men.

The most revealing opinion in this 1795 volume is Aylett v. Minnis et al. (Wythe 219), which was totally rewritten for publication. Here Wythe attacked English usage in Virginia and provided an alternative. The case, involving succession, was decided on appeal from Wythe's court on the basis of a precedent from the King's Bench. Wythe considered the precedent bad law. He complained (227) that "truth, justice, and the indisputable principles of law, conspiring together, will sometimes no more enable a demand to stem the torrent of authority than a fiar wind, aided by concurrent tides" would have been able to save the ships of Aeneas from destruction upon the shoals. It was this slavish reliance on English precedent, against both common sense and the rational principles of law, that most irritated Wythe. The Chancellor said, however, that the frustrated young lawyer should not go out and burn all of his case books as a sacrifice to Astrea, Goddess of Justice, but rather, as Prometheus taught, he should burn only the vile parts, i.e. the erroneous decisions.

Then follows Wythe's most important point. American judges should compile for themselves a body of civil law equal in value to the Corpus Iuris Civilis. Why, he queried, should an American judge follow English authority, especially when English judges do not follow American authority? He said (232), "The resolution of an american court, quoted in Westminster hall, if any counsil there should venture to expose himself to ridicule, perhaps rebuke, by the

quotation, would be treated, if not with fastidious neglect, like sus Minervam." Wythe ended by saying that he would not wait for leave from any English judge before he could reject English precedent, and other Virginia judges should do the same.

Wythe continued to publish individual decisions after 1795, with the same goals in mind: to clarify the law by providing rational principles for its execution. His most vitriolic attack came in 1796 with a treatise entitled The Case upon the Statute for Distribution. Here he denounced the "jargon and garrulities" of Westminster Hall and those who were slavish to its "crudities and babblings." The English method of interpreting law he likened to a painter who puts a human head on a horse's body (Horace, AP 1-2). At his most ironic, Wythe becomes the Cumaean Sibyl, saying that there have been so many erroneous Westmonasterian decisions, that "non mihi si linguae centum oraque centum, ferrea vox...omnia... percurrere nomina possim" (Aen. 6.625-7). Appropriately enough, this was told to Aeneas about those who had committed crimes against justice. Wythe also seems to be suggesting that the pontifications of Westminster are similar to the responsa which tumble like the wind from the Sibyl's cave, "lati...aditus centum, ostia dentum."

Wythe's final blast in print at English judges came in 1799. In lieu of simplicity, English judges have tied a Gordian knot of tangled precedent. The knot must be slashed by judges like himself; and if other judges will not do so, then the legislature must enact laws to counteract these precedents. As the Virginia legislature had somewhat rationalized the laws of succession, Wythe praised it as a Daedalus who freed law from the Cretan Labyrinth of precedent.

In his advocacy of a newer and more rational judicial system, Wythe used as his model the Roman legal system. He was, in a sense, a precursor, both by his teachings and actions, of the greater Roman law movement of the nineteenth century.

The Revolution and the adoption of the Constitution did not pose quite the same problem for the federal courts as it did for the state courts. One of the major issues of these early years was state sovereignty as opposed to national authority. Within the Supreme Court this issue manifested itself primarily in jurisdictional disputes.

Between 1794 and 1796, three cases with jurisdictional import reached the Supreme Court in which classics played a minor role, always on the side of federal jurisdiction. These cases are Glass v. the Sloop, Betsey (3 Dallas 6: 1794); Penhollow v. Doane's Administrators (3 Dallas 54: 1795); and Ware v. Hylton (3 Dallas 199: 1796).

By far the most important case in these early years was Chisholm v. Georgia in 1793. This was not a question of admiralty jurisdiction, or of court decsions rendered prior to the adoption of the Constitution, but was much more fundamental: could a citizen of one state sue another state? Here again, when classics were cited, they were cited on the side of national authority. The only Justice to argue on the side of Georgia was Iredell, and his opinion is worth noting. In a long set of legal arguments, the Justice quotes extensively from English statutes and commentaries; he also makes extensive use of the decisions of the English Chancellors and Chief Justices. The result of his analysis is predictable: the states are sovereign, at least in some areas, and, therefore, they

cannot be sued.

The other Justices argued in favor of the suit and of federal jurisdiction over it. Of these Justices, Blair, Cushing, and Jay felt that historical analogy and British law were inadequate grounds for either granting or denying the jurisdiction of the high court. All of them looked exclusively to the Constitution for their arguments. Only Attorney General Randolph and Justice Wilson looked to other sources as well as to the Constitution.

The United States Attorney General, in a manner remeniscent of the Constitutional Convention, argued, in part, by historical analogy to show federal jurisdiction. In discussing the nature of Greek leagues and confederacies, Randolph made two points. On the one hand, the new federal union cannot be compared to anything, past or present. The United States was unique. On the other hand, the ancient federal leagues were more like the United States than any modern confederacy. Therefore, to help support his claim of federal authority and to indicate that this authority by no means denigrated the dignity of the individual states, Randolph maintained that "it would not be extravagant to conjecture that civil causes were sustained before the Amphictyonic Council." This same Council would be used in the nineteenth century to describe the august position of the Supreme Court (30 Fed. Cas. 1287).

It was from Justice Wilson, however, that the most eloquent and pellucid arguments came. In order to show that Georgia was not a sovereign state, Wilson argued from the general principles of jurisprudence, and by historical analogy and the Constitution. Classical allusions abound in each area of his argument. In juris-

prudence, Wilson quoted from Cicero's de Re Publica to show the "transcendent excellence" of the United States as a whole, against the inferior position of Georgia as a part. Historically, Wilson looked to the position of the Athenian courts within the Delian League as an example of the unification of law and liberty. Positive analogy was also to be found in the Spartan constitution, where the ephors had authority to prosecute the kings. So much, Wilson argued, for the immunity of sovereigns. Wilson then turned to the Constitution and the supremacy of the American People as a whole. After criticizing the French and English systems for being governments without people, he argued that America was different. America, he maintained, was most closely akin to Athens. Wilson said, in part, "On the mention of Athens, a thousand refined and endearing associations rush at once into the memory of the scholar, the philosopher, and the patriot." For Wilson, the most important memory was that Athens was known to all by its citizens, by the demos. "With the strictest propriety, classical and political," he noted, "our national scene opens with the most magnificent object which the nation could present: 'The People of the United States' are the first personages introduced." He then went on to argue, on the basis of the Constitution and its superiority, for the validity of the suit and the jurisdiction of the Court over it.

IV

To sum up, the birth of the new Republic created a situation in which classics played two important roles vis-à-vis the new legal institutions. First, classics provided a model for action. The question as to how the new courts were to proceed suggested

different solutions to the problem. For men like Pendleton and Iredell, the answer was relatively simple: follow the example of Westminster Hall whenever possible. But the English system was not always applicable on a national level, as Justice Chase notes in U.S. v. Worrall. This prompted a solution followed by Blair, Cushing, and Jay in Chisholm v. Georgia: the laws of Congress and the Constitution were to be the sole guiding principles. Then, following the British pattern, laws and precedents would build up slowly, and these would then be used in succeeding decisions. A more novel solution was usggested by Wythe. Since America did have a chance to begin afresh, why not do away with a cumbersome, if not outmoded and feudal, system? He proposed a legal system akin to that of Rome. In the end, Wythe lost, and a compromise was reached between the precedents of Westminster and the exigencies of America.

Classics played another role as well. The break with England and the recent past caused the creation, or adaptation, of a new set of symbols for the new nation. As a republic, many of these symbols were connected with the classical past. While the traditionalist looked to England for symbols and arguments, those who felt the break with England the strongest looked to classics as the natural source for references. For those, like Wythe, who wanted to chart a new course for law, or for those like Wilson, who desired a strong national government, classics provided the allusions and precedents that they needed for their opinions.